34946-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

COREY BURMAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

OTHER STATE CASES

STATUTES

RULES

OTHER

I. ISSUES PRESENTED

1. Did the trial court properly exclude mention of the victim Ms. Sweet's 2012 conviction for rendering criminal assistance to a person who had committed and was being sought for a murder, when the defendant failed to establish either that he had knowledge of the prior act of the victim, or that this prior conviction was relevant to his self-defense claim?

2. Did the trial court err in excluding mention of Ms. Sweet's conviction for rendering criminal assistance after the fact to a murder in 2012, if the defendant did not submit any evidence that he was fearful of Ms. Sweet at the time of the murder, and, in fact, testified that he was not fearful of Ms. Sweet?

3. Did the defendant invite error, if any, when he requested the trial court analyze his request to proffer evidence under ER 404(b) concerning Ms. Sweet's conviction for rendering criminal assistance?

4. Did the trial court err if it excluded evidence of Ms. Sweet's conviction for rendering criminal assistance after the fact to a murder in 2012 as reputation evidence if the defense attorney specifically stated he was not offering the prior acts of Ms. Sweet to establish her reputation for violence under ER 404(a)(2), for the purpose of a "first aggressor" instruction and defendant's claim of self-defense?

II. STATEMENT OF THE CASE

Procedural history.

The defendant was charged with premeditated first degree murder, and, in the alternative, second degree felony murder, with second degree assault as the predicate crime. CP 12-13 The crimes included a deadly weapon enhancement allegation. CP 12-13. The defendant was also charged with one count of interfering with the reporting of domestic violence. CP 13. The court instructed the jury regarding self-defense. CP 72 (WPIC 16.02) (Justifiable Homicide-Defense of Self); CP 75 (WPIC 16.03) (Justifiable Homicide-Resistance to Felony); CP 76 (WPIC 16.08) (No Duty to Retreat). A jury found the defendant guilty of first degree murder, including the deadly weapon enhancement, and of interfering with the reporting of domestic violence. CP 80, 84.

Substantive history.

On January 29, 2016, Alicia Sweet was living with the defendant. RP 268. The couple resided at 609 South Howe in Spokane, with another couple, Norman Anderton and Pamela Schuman. RP 267-69. During the approximate two to three months that the defendant and Ms. Sweet lived at the residence, Mr. Anderton never heard any loud arguments or observed any physical confrontations between the defendant and Ms. Sweet. RP 269, 278. Several days before the murder, the defendant had mentioned to

Ms. Schuman that he believed Ms. Sweet was "messing around" on him. RP 291. The defendant also remarked around the same time that he did not believe Ms. Sweet was seeing other people, but she had better not be. RP 292, 294-95.

On January 29, 2016, Mr. Anderton was in the living room of his home and heard noises from within the southeast bedroom.[1] RP 271. Mr. Anderton ignored the noises until he heard a "really loud thump." RP 271. Mr. Anderton briefly investigated, did not hear anything further from the bedroom, and sat down on the couch. RP 271. The defendant emerged from the bedroom, walked to the sink in the kitchen, and "had a strange look in his eye." RP 271-72. The defendant had a folding knife[2] in his hand and he had blood on his shoes. RP 272. The defendant began washing his face and hands. RP 280. Mr. Anderton asked the defendant to put the knife down and he declined to do so. RP 282.

Mr. Anderton returned to the bedroom and observed Ms. Sweet lying prone on the floor, with blood on her legs. RP 273-74. Mr. Anderton returned to the living room and attempted to dial 911 with his cell phone, when the defendant remarked: "You're calling 911, aren't you?" RP 274.

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[1] During this time, Mr. Anderton did not hear any voices or argument in the bedroom. RP 278-79.

[2] The blade was approximately four to five inches. RP 272.

Still armed with the knife, the defendant grabbed the cell phone, and walked back into the kitchen. RP 274-75. Mr. Anderton promptly exited the house, got into his car, and drove away from the scene. RP 275. Mr. Anderton subsequently called 911, from a nearby relative's home. RP 277, 1008.

Deputies responded to the scene at 6:53 p.m. RP 1008. They entered the home and observed Ms. Sweet, who was unresponsive and covered in blood, lying on the floor between the bed and the bedroom wall. RP 503. Ms. Sweet died at the scene. RP 616. The bedroom was in disarray, consistent with a prior struggle. RP 610-11. Blood was observed over the entirety of the barrel of a shotgun located in the bedroom, but mostly concentrated on the breach (nearest to the shooter) end of the barrel. RP 753. A later DNA analysis determined the blood on the barrel matched Ms. Sweet. RP 639-41. The knife used by the defendant was never recovered by law enforcement. RP 759, 780.

Canine Deputy Jason Hunt started a track with his dog at the 609 South Howe address and continued to the intersection of Howe Street and Barclay Avenue. RP 411-19, 421-23. Deputy Hunt observed a male running southbound on Barclay, who disappeared behind a shed. RP 423. Eventually the canine contacted the defendant hiding under a trailer. RP 426-30. The defendant had a laceration from the dog, a cut or laceration

on his right index finger, and what appeared to be a black eye. RP 432-34, 444-45, 737.

Spokane County Medical Examiner, John Howard, conducted an autopsy on Ms. Sweet. At the time of autopsy, Ms. Sweet was five-foot-seven-and-a-half inches tall and weighed 140 pounds. Blood was observed on Ms. Sweet's head, face, neck, chest, abdomen, back and all four extremities. RP 528. At the time of examination, Ms. Sweet had lost most of her blood. RP 529.

Ms. Sweet's external injuries included blunt impact injuries, contusions and abrasions to the face and scalp, right arm, elbow and forearm. RP 533, 541. A pattern injury was documented consistent with being caused by the impact of a rifle barrel.[3] RP 544-46. Dr. Howard also documented areas of contusion involving Ms. Sweet's right thigh, knee, leg and an abrasion on the right foot. RP 535. In the upper left extremities, Ms. Sweet had three areas of cuts on her shoulder and arm. RP 534. In addition, there were areas of contusion involving the left arm, elbow and forearm and a group of both abrasions and superficial cuts, in the front of her left arm and an abrasion in the left forearm. RP 535. Moreover, there

[3] Law enforcement located a shotgun inside the bedroom, underneath a desk, at the crime scene. RP 752. Only the muzzle was visible upon entry into the bedroom. RP 752, 754.

were additional cuts or sharp instrument injuries to the back of her left thumb, a cut or incise wound to her index finger, a cut to the middle finger, and a cut to the ring finger on the left hand. RP 536. The doctor also documented approximately twenty-four areas of irregular bruising or abrasions involving the face going from the forehead to Ms. Sweet's jaw. RP 541

Dr. Howard recorded both blunt and sharp instrument injuries in the chest area, contusions across the chest proceeding towards the collarbone and left shoulder, as well as the right shoulder. Further, there was a combined cut and abrasion in the right side of the chest. RP 538. Additionally, there was also a stab wound which penetrated the chest wall and there were five stab wounds to the neck, three of which penetrated to the bone of the spine and one of which struck the jugular vein. RP 538, 547-49, 558, 560. All stab wounds were front to back. RP 557.

Dr. Howard opined that the manner of death was caused by stab wounds and other sharp instrument injuries, with contribution from multiple blunt injuries and the cause of death was loss of blood. RP 551. A toxicology screen indicated the presence of methamphetamine and THC in both the defendant and Ms. Sweet. RP 530, 700-01, 716-20. The defendant claimed he had not ingested any drugs the day of the event. RP 849-50.

The defendant testified he and Ms. Sweet had an argument over drugs. RP 812-13. The defendant asserted he began laughing at Ms. Sweet, and Ms. Sweet reacted by grabbing a knife. RP 815-16. The defendant averred that Ms. Sweet took a "quick stab" at him and he questioned her why she did this. RP 816-17. He stated Ms. Sweet took another swing at him with the knife, and stabbed him in the finger. RP 818.

The defendant claimed he pulled Ms. Sweet to the bed and a struggle ensued. RP 820-21. He stated Ms. Sweet dropped the knife and he shoved Ms. Sweet away from himself. RP 821. The defendant next asserted that Ms. Sweet struck his right eye with a bar. RP 822. His lawyer asked if it was the shotgun barrel or a bar, and the defendant corrected himself and stated it was a shotgun barrel. RP 822. The defendant alleged that it took approximately ten minutes to secure the knife from Ms. Sweet and she did not drop the knife until he told her, "Hey, man, you almost cut my fucking finger off." RP 823.

The defendant then stated he stabbed Ms. Sweet and they fell to the floor. RP 823. He averred he did not know how many times he struck Ms. Sweet with the knife and maintained that he struck Ms. Sweet with the shotgun barrel because he was scared Ms. Sweet would again strike him with it. RP 824.

The defendant next asserted that he climbed out a bedroom window and reentered the house through a side door and walked to the sink. RP 826. The defendant did not call 911 because he was afraid of going to jail. RP 826. The defendant stated he ran from the house because he was scarred[4] and dropped the knife somewhere in a field. RP 830. When contacted by the deputies, the defendant testified: "I told them that I got no weapons on me. And then I told them that my fucking, excuse me, that my girlfriend bitch tried to do me in." RP 833.

During cross-examination, the defendant stated that he was five-foot-ten-inches tall and weighed approximately 25 pounds more than Ms. Sweet. RP 836. Regarding the size difference, the defendant stated: "They were all -- we're wrestling around. Where do you think they're just out to the side the whole time (referencing his hands)? This lady is 5'7, 140 pounds. She ain't no little girl." RP 862.

The defendant stated he did not recall telling Ms. Schuman that Ms. Sweet may have been dating others. RP 841-42. The defendant stated he and Ms. Sweet had one previous physical altercation approximately one and one-half years prior to the incident. RP 845. The defendant alleged he obtained methamphetamine from Ms. Sweet. RP 846. The defendant stated,

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[4] Presumably because he had killed Ms. Sweet in the bedroom.

on the day of the event, Ms. Sweet had been acting like an "asshole." RP 850.

The defendant stated the first instance Ms. Sweet allegedly tried to stab him was not serious, but he took it seriously the second time she allegedly tried to stab him. RP 853. The defendant admitted he could have left the bedroom at this point. RP 853. The defendant also claimed that he did not shout for help because he was "scared." RP 857. He further asserted the stab wound to Ms. Sweet's chest was self-inflicted when they were "rolling around." RP 861-62. When confronted regarding the number of stab wounds to Ms. Sweet, the defendant maintained that he was not trying to hurt or kill her and that infliction of all stab wounds occurred at the same time. RP 884-85 More specifically, he stated: "I didn't stab her one time and stab her again and stab her again and stab her again." RP 885. The defendant also claimed that even after the stab wounds to Ms. Sweet's throat, she could maintain a hold on the breech end of the shotgun. RP 911.

Regarding jumping out the window, the defendant asserted he was scared. RP 923-24. The defendant denied asking Mr. Anderton if he was calling 911 (emergency services). RP 936-37.

III. ARGUMENT

A. THE DEFENDANT PROVIDED NO EVIDENCE HE HAD ANY KNOWLEDGE OF ANY PRIOR VIOLENT ACT OF THE VICTIM WHICH WOULD HAVE BEEN RELEVANT TO HIS CLAIM OF SELF-DEFENSE THAT HE HAD REASON TO FEAR THE VICTIM.

Standard of review.

An appellate court reviews a trial court's evidentiary rulings for abuse of discretion and defers to those rulings unless "no reasonable person would take the view adopted by the trial court." *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). If the court finds an "evidentiary error which is not of constitutional magnitude," it should reverse only if the error "materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

If the trial court excludes relevant defense evidence, an appellate court determines as a matter of law whether the exclusion violated the constitutional right to present a defense. *Clark*, 187 Wn.2d at 648-49. If there is constitutional error, the verdict should be upheld "only if [the court is] convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

In that regard, a defendant in a criminal trial has a constitutional right to present a defense. *State v. Rehak*, 67 Wn. App. 157, 162,

834 P.2d 651 (1992). However, a criminal defendant's right to present a defense is not absolute; a defendant seeking to present evidence must show that the evidence is at least minimally relevant to a fact at issue in the case. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

In the present case, defense counsel proffered a protracted, vague offer of proof regarding the defendant's self-defense claim concerning Ms. Sweet's conviction for rendering criminal assistance to a murder after the fact in 2012:[5]

> So the facts are that Mr. Burnam knows Ms. Sweet to be associated with Bud Brown, who was alleged to have committed a homicide. Ms. Sweet's involvement that she pled guilty to was the providing of a firearm. I think that -- and I don't want to overstate the law enforcement's position in the Bud Brown homicide, but I believe that law enforcement was under the impression or thought that she had been more involved, in fact, that she may have even been there and been a participant.
>
> What Mr. Burnam knows is that Bud Brown is his cousin, is that Ms. Sweet and Mr. Brown were involved in this situation and that he has some direct knowledge of her involvement in that situation. Where that all comes to fruition is what was Mr. Burnam thinking on that night. He was in a confrontation with somebody who they had both

[5] *See* CP 165-66 (affidavit of probable cause regarding the rendering criminal assistance charge).

> been using methamphetamine. There was physical confrontation whereby each party was hit with a barrel of a, just a barrel of a shotgun, and a knife got involved and Mr. Burnam was in fear for his life. He has what I believe are defensive wounds on his hands and he has a black eye m a result of the hit from Ms. Sweet.

RP 209-10.

> So that night, when things escalated to physical violence, the evidence would have to be what in Mr. Burnam's mind about what's reasonable and what's possible. If we take out the possibility that this person is capable of being associated with or being in or participating in a homicide, it takes away the reasonableness of what Mr. Burnam is thinking. And the jury doesn't get to know that.

RP 210.

> And I understand that the State was only able to prove rendering criminal assistance; however, *I suspect that Mr. Burnam's impression or what his state of mind is that she was a little more involved than law enforcement was able to prove*. And that's what's important and that's why that's critical. There is other criminal history Ms. Sweet has and that's clearly character evidence that I'm not interested in getting into.
>
> Rendering criminal assistance is important because of what it was rendering criminal assistance to. Mr. Bud Brown is not a very nice guy and he has several investigations in relation to other homicides. *The fact that Ms. Sweet associated with him and was involved in one of these homicides is something that I believe the jury gets to know for the sole purpose of what's going through Mr. Burnam's mind on that night*. So that's the only piece of her criminal history that I believe is relevant and appropriate. I don't think that -- she does have a prior theft that would qualify, but we're not asking to admit any of that. Basically, what we

> are asking is he knows that she is involved, can be involved in a situation like this and that's what's important.

RP 210-11 (emphasis added).

> THE COURT: And in terms of methods, you're not offering it by way of reputation; you're offering it or proffering it by way of specific instance of conduct.
>
> [DEFENSE ATTORNEY]: … Yes, Your Honor. And the idea is precisely that. There is sort have boil it down to its most basic terms, *if you're involved in or around homicides, somebody's state of mind when you're in a physical confrontation has to include that information.* And the jury gets to know that. *So in this particular instance, Ms. Sweet was involved with a homicide.* Now all that the jury -- and I think we can limit that for purposes of what the jury knows, which is to say this information is not being offered to suggest Ms. Sweet was not a good person or that she had a bad reputation in the community. The reason for this evidence is what was in his mind on that night. And I think that it's appropriate for that. We're not asking to throw Ms. Sweet under the bus with any prior criminal history or to suggest that she was a bad person. This was a specific instance with an act consistent with homicide, which goes to the reasonableness of Mr. Burnam's behavior. Because I anticipate when the jury sees the photographs, that they will be and appropriately so, somewhat overwhelmed because they are shocking. *Part of our defense is that this is somebody who is capable of, is capable of being involved in a homicide*, is high on methamphetamine, and we are at that point assessing what Mr. Burnam's state of mind is. And his state of mind is, which the State has a witness from the crime lab presumably to testify that Mr. Burnam had methamphetamine in his system, so this kind have all comes to fruition in this moment where Mr. Burnam has to decide, "okay, I know that she's capable of this; she has a knife; I know she has used drugs because I used them with her. It's

> me or her." And that's where the reasonableness of what's going through his mind becomes important.

RP 212-13 (emphasis added).

> I would note that the State in its initial briefing noted or suggested that there was no evidence that Mr. Burnam was aware of anything to do with the situation involving Bud Brown and Alicia Sweet. However, in their own report on this case, Detective Keyser referenced it, and I referenced it in my briefing. It is clear by a plain reading of the attached, jut [sic.] Affidavit of Facts on Bud Brown and Alicia Sweet that the State provided in its briefing that law enforcement believed that Ms. Sweet was more involved than what they could prove. The fact that she only pled guilty to a rendering criminal assistance means that's all they can prove.
>
> The purpose of this sole piece of evidence, because we are not putting Ms. Sweet's character on trial here. We're not going into the deliveries, not going to theft, not going into other behaviors in the community and positions that people, reputation of people what people thought of Ms. Sweet in the community. This is one instance and it's one instance where law enforcement thought that Bud Brown and Alicia Sweet gunned down somebody in Spokane.
>
> *Now, the fact that they couldn't prove any more than rendering criminal assistance doesn't mean that's not what Mr. Burnam's state of mind is.* And the State's reliance on 405 takes away precisely what 404(a)(2) is designed to address, which is, we are arguing that Ms. Sweet was the primary aggressor; that she was the party who initiated this confrontation.
>
> The reality is that once we have made that a proffering that and have offered an affirmative defense, the next step is what is in his mind. What is in Mr. Burnam's mind, and is it reasonable.
>
> In order for the jury to get a complete picture, we're not asking the jury to consider a theft from 10 years ago or

> delivery of controlled substance or any of that information. It's one incident of specific conduct that goes to why it's reasonable that she was a primary aggressor, and more important, why it's reasonable that Mr. Burnam would think that. Why in that situation would he go, you know what, she's never really done anything before, so this isn't going to get out of control. Or wait, she was dating my cousin, Bud Brown. She's dating me now. I've known her a long time. *I know they were involved in this situation, in one instance, where somebody ended up dead and she disposed of the weapon. That's what she was convicted of. That's what's in his mind at the time.* Couple that with she is high on methamphetamine. That's what the jury gets to hear. The jury gets to hear these two things or these specific instances of conduct cause it goes to what's reasonable in his mind.

RP 218-20 (emphasis added).

> *The fact that the State can only prove rendering criminal assistance is not something that diminishes what Mr. Burnam had in his mind.* And that's what's important. And for the State to now suggest this all happened back in 2012, that makes it worse, as far as I am concerned. That means for three-and-a-half, four years, Mr. Brown and Ms. Sweet had not been involved, had not been convicted or had any sort or been in trouble for that. Yes, these allegations were out there, but as far as allegation, allegations as far as Mr. Burnam is concerned, I don't anticipate arguing this, but let's take it to logical end, which is to say Mr. Burnam could be in the bedroom knowing, you know what, she killed before or she was involved in a murder before, and she got away with an unranked felony. And it may not have been that precise of thinking, but that's what she walked away from.
>
> *So for the State to somehow step back and say, well, she wasn't really that involved, she disposed of a weapon after the fact, that maybe what they could have proven. But the jury gets to know that she was involved in that because it goes to what's in Mr. Burnam's mind, what he is thinking at that moment*.

> Once we have taken on the burden of establishing self-defense or offering self-defense, that gives us room to present evidence. Again, we are not asking -- we're not bringing in a group of people who Ms. Sweet associated with in the community and may have been involved in thefts and drug dealing. This is one incident where she was involved with somebody who committed homicide. She was convicted of a crime associated with that homicide. That goes to what is reasonable in Mr. Burnam's mind, and that's why under 404(a)(2) it's perfectly admissible.

RP 220-21 (emphasis added).

After argument, the trial court ruled on the motion:

> [THE COURT]: During argument, Mr. Reid confirmed that the defense is not in this case seeking to offer ER 404(a)(2) trait or character evidence by proof of reputation of Ms. Sweet as being aggressive or an aggressor in context. Is that correct?
>
> MR. REID: Yes, Your Honor.
>
> THE COURT: The defense is, however, seeking to offer evidence of ER 404(b), other crimes, wrongs or acts, to support a defense of self-defense. The method would be through ER 405(b), which also addresses other crimes, wrongs or acts.
>
> Paraphrasing, the defense submits that Mr. Burnam was aware that Ms. Sweet had some manner of involvement in a 2012 homicide involving Mr. Burnam's cousin, Bud Brown, who Ms. Sweet in 2012 was dating at or near the time of the homicide. In our hearing, there was no specific offer of proof of specifically what Mr. Burnam knows and what the source of the purported knowledge was at the time of Ms. Sweet's death, which is the subject of this case, in which occurred on January 29, 2016. There is no anticipated or proffered evidence of Mr. Burnam and Ms. Sweet fighting

> or being confrontational with one another prior to this faithful [sic]day.

RP 246-47.

The trial court subsequently analyzed ER 404(b) and held, in relevant part:

> The defense advocates that this is to show that what was in the mind of Mr. Burnam. Mr. Burnam advocates Ms. Sweet was capable of hiding a violent and painful murder and this shows her ability to be violent and act first. The State submits it is a character attack on Ms. Sweet, who is a victim. What is certain is all Ms. Sweet has pled to was rendering criminal assistance after the fact. We have no other showing of any violent act on her part. And if I'm missing something or omitting something that was proffered to the court, I urge you to bring it forward. In fact, it appeared in argument that Ms. Sweet and Mr. Burnam got along until the fateful of January 29, 2016. So we do not have, has I indicated, a preponderance of evidence that Ms. Sweet actually committed an act of violence or aggression against anyone.

RP 246-52.

1. The defendant's offer of proof regarding his state of mind based upon a past act of Ms. Sweet was nothing more than conjecture and innuendo. Moreover, his offer of proof contained no facts regarding any prior specific, violent act committed by Ms. Sweet which the defendant had knowledge of or that it made him fearful of Ms. Sweet during the commission of the present murder.

Evidence of a victim's violent[6] actions or reputation may be admissible to show the defendant's state of mind at the time of the crime

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[6] The word "violent" is defined as: "Of, relating to, or characterized by strong physical force … [r]esulting from extreme or intense force …

and to indicate whether he had reason to fear bodily harm. *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907 (1972); *accord State v. Adamo*, 120 Wash. 268, 269, 207 P. 7 (1922). Thus, a defendant "may, in addition to the character evidence, show specific acts of the [victim] which are not too remote and of which [the defendant] had knowledge at the time of the [crime] with which he is charged." *Adamo*, 120 Wash. at 269; *accord State v. Fondren*, 41 Wn. App. 17, 25, 701 P.2d 810 (1985) ("Evidence of specific acts may be admissible for the limited purpose of showing whether the defendant had a reasonable apprehension of danger"); *State v. Duarte Vela*, 200 Wn. App. 306, 319, 402 P.3d 281 (2017), *as amended on denial of reconsideration* (Oct. 31, 2017) ("Evidence of a victim's propensity toward violence that is known by the defendant is relevant to a claim of self-defense because such testimony tends to show the state of mind of the defendant ... and to indicate whether he, at that time, had reason to fear bodily harm").

In *Adamo*, the court stated:

> where the person accused is defending, in whole or in part, on the ground that at the time of the homicide he believed, and had good reason to believe, that he was in danger of his life, or great bodily harm, he may, in addition to the character evidence, show specific acts of the deceased which are not too remote and of which he had knowledge at the time of the killing with which he is charged. *But such acts of the deceased may not be shown unless it appears they were*

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[v]ehemently or passionately threatening." BLACK'S LAW DICTIONARY 1706 (9th ed. 2009).

> *brought to the knowledge of the defendant before he committed the crime charged.*

Id. at 270-71 (emphasis added).

Accordingly, a claim of self-defense is available only if the defendant first offers *credible* evidence tending to prove that theory or defense. *State v. Dyson*, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997); *see also State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) ("The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it]").

For example, in *State v. LeFaber*, 77 Wn. App. 766, 768-69, 893 P.2d 1140 (1995), *reversed on other grounds*, 128 Wn.2d 896 (1996), LeFaber was charged with second degree murder. He argued the trial court erred in excluding testimony by several of his neighbors about prior incidents which led *them* to believe the victim was violent or mentally challenged. *Id.* at 769. The evidence was proffered in support of LeFaber's self-defense claim prior to LeFaber testifying. *Id.* This Court found:

> [p]rior violent incidents would be relevant to establish Mr. LeFaber's reasonable apprehension on the night of the crime, an essential element of his self-defense claim, but only if it was shown that he knew of those incidents. The other witnesses testified prior to Mr. LeFaber; they did not testify that he knew of the incidents. Absent evidence of Mr. LeFaber's knowledge, evidence of [the victim's] prior acts was not relevant to prove reasonable apprehension.

LeFaber, 77 Wn. App. at 769.

In *State v. Bell*, 60 Wn. App. 561, 564 n. 1, 805 P.2d 815, r*eview denied*, 116 Wn.2d 1030, 813 P.2d 582 (1991), regarding the victim's reputation, the court held: "[e]vidence of acts such as fights, quarrels, and insulting words ... is admissible on the issue of reasonable apprehension of danger on the part of the defendant, provided the defendant knew of the acts."

Similarly, in *State v. Negrin*, 37 Wn. App. 516, 525-26, 681 P.2d 1287, *review denied*, 102 Wn.2d 1002 (1984), in a prosecution for first degree manslaughter, Negrin contended the trial court erred when it limited testimony regarding the victim's reputation for violence. Specifically, defense counsel made an offer of proof at trial that the trial court should allow a witness to testify that the victim had told the witness that he was going to "cause someone to, in a confrontation, to shoot him." *Id.* at 525.

The *Negrin* court found the defendant's offer of proof was inadequate because it did "not specify what [the witness's] testimony would have been, give any information on the reliability or credibility of the witness, or adequately inform the trial court of the legal theory supporting admissibility of the proffered hearsay testimony." *Id.* at 526. The reviewing court further held the trial court did not err in excluding the proposed

testimony because Negrin testified he did not know the identity of the victim before Negrin shot the victim. *Id.* at 526

Likewise, in *State v. Upton*, 16 Wn. App. 195, 202, 556 P.2d 239 (1976), as an offer of proof, the defendant proposed to testify that during an unidentified time in the past, he had overheard a conversation in which the victim was accused of having shot and killed his former wife. *Id.* The court found this testimony was too remote and did not constitute proof of a specific act of violence by the victim. *Id.* The court noted there was no showing of the date when the alleged killing took place and the defendant was uncertain as to who made the statement he allegedly overheard. *Id.* Moreover, it did not appear that the defendant understood or believed the victim had, in fact, killed his wife. In so holding, the court stated: "In view of the speculative and ambiguous nature of the offered testimony, it was properly excluded" for a claim of self-defense. *Id.*

In like manner, in *State v. Walker*, 13 Wn. App. 545, 549, 536 P.2d 657 (1975), *review denied*, 86 Wn.2d 1005 (1975), the State moved to prohibit any mention to the jury of the prior arrests of the victim. The FBI record of the victim showed arrests for violent crimes. The defense did not offer to introduce the FBI record to show that the victim had a reputation for violence known to the defendant, or that the defendant was aware of specific acts of violence committed by the victim. On appeal, the

court found *proof* of either of those circumstances would have been admissible regarding the defendant's self-defense claim. *Id.* at 549. However, the court found the trial court did not err in excluding these claimed acts of violence because there was no evidence the defendant had knowledge of the FBI record. *Id.* at 549.

Here, defense counsel never addressed, offered, or specifically stated what facts the defendant knew or what knowledge he had regarding a previous murder purportedly committed by Bud Brown or that any specific, violent act or acts were committed by Ms. Sweet during the previous murder. Defense counsel remarked several times that the defendant had "knowledge" of Ms. Sweet's "involvement" in the prior murder. However, counsel tactically never provided any detail or facts concerning any participation by Ms. Sweet in the prior murder. More specifically, defense counsel did not distinguish between Ms. Sweet disposing of the murder weapon after the fact and what knowledge, if any, the defendant had regarding any specific, violent act committed by Ms. Sweet during the prior murder. Indeed, defense counsel never identified and the record is void of *any* violent act committed by Ms. Sweet during the prior murder.

It is apparent defense counsel wanted to introduce the existence of the prior murder and Ms. Sweet's association[7] with Mr. Brown to imply "guilt by association," suggesting if Ms. Sweet was "involved" with a murderer, she could commit murder. Such an argument would have been improper. *See State v. Fuentes,* 183 Wn.2d 149, 165, 352 P.3d 152 (2015). ("We do not indulge in guilt by association in our state, and a person does not become a criminal simply by being with people or in places that are or are perceived to be associated with criminal activity").

Contrary to defense counsel's argument at the motion, Ms. Sweet was convicted of rendering criminal assistance for disposing of the murder weapon after the fact in 2012. The defendant has offered no authority that the crime of rendering criminal assistance is a violent act. To the contrary, rendering criminal assistance is statutorily classified as a non-violent offense. *See* RCW 9.94A.030(34) (nonviolent offense); RCW 9.94A.030(55) (violent offense).[8]

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[7] Defense counsel argued at the motion: "The fact that Ms. Sweet associated with [Mr. Brown] and was involved in one of these homicides is something that I believe the jury gets to know for the sole purpose of what's going through Mr. Burman's mind on that night." RP 211.

[8] A victim's prior conviction for a nonviolent crime is not probative to a defendant's self-defense claim. *People v. Cook,* 352 Ill. App.3d 108, 127, 815 N.E.2d 879 (2004).

In addition, defense counsel never represented the defendant was subjectively fearful of Ms. Sweet because of the previous murder and that he acted on that knowledge and fear during the current murder. To the contrary, the defendant testified at trial that he was not fearful of Ms. Sweet.

> [DEFENSE ATTORNEY]: She's taken a couple hits of methamphetamine and had lunged at you [with the knife] now three times and you're still not scared for your life?
>
> [DEFENDANT]: That's my girlfriend. I'm not –

RP 819.

Overall, defense counsel offered nothing more than guesswork and conjecture regarding what, if anything, the defendant knew regarding any previous specific, violent act committed by Ms. Sweet or why he was fearful of Ms. Sweet at the time of the murder. As stated long ago by our high court:

> The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture. It is also the rule that the one having the affirmative of an issue does not have to make proof to an absolute certainty. It is sufficient if [the] evidence affords room for [individuals] of reasonable minds to conclude that there is a greater probability that the thing in question, such as the occurrence of a fire, happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable. In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.

Gardner v. Seymour, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947).

As aptly observed by an Arizona court regarding a claim of self-defense, even though the "slightest evidence" standard will support giving a self-defense instruction, "[i]nferences that 'mak[e] an argument possible' do not substitute for the slightest evidence, and a [self-defense] instruction must rest upon something more than 'speculation.'" *State v. Carson*, 242 Ariz. 6, 391 P.3d 1198 (Ct. App. 2017); s*ee also State v. Vassell*, 238 Ariz. 281, 284, 359 P.3d 1025 (Ct. App. 2015) ("speculation cannot substitute for evidence" in a self-defense context); *State v. Revels*, 195 N.C. App. 546, 552, 673 S.E.2d 677, *review denied*, 803 S.E.2d 152 (N.C. 2017) (holding a self-defense instruction was unwarranted where alleged self-defense evidence failed to "rise[ ] above mere possibility and conjecture"); *State v. Melchior*, 56 Ohio St. 2d 15, 20, 381 N.E.2d 195 (1978) (regarding self-defense, "[i]f the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted").

Here, the defendant's reliance on this Court's decision in *Duarte Vela* is misplaced. In that case, the trial court ruled that Duarte Vela could not introduce evidence that the victim had made a direct threat three years earlier to kill Duarte Vela's family and Duarte Vela was aware of the threat; that Duarte Vela had knowledge that the victim had allegedly abducted his

younger sister several years earlier; and that the victim had allegedly repeatedly battered Duarte Vela's relative until five or six years before trial which Duarte Vela purportedly knew about. These assertions were specific instances of conduct of actual violence and propensity for violence on the part of the victim which preceded the murder. This Court found the victim's past threat to kill Duarte Vela's family was central to his ability to explain the reasonableness of his fear. 200 Wn. App. at 313. The Court found the trial court erred because its exclusion of this evidence deprived Duarte Vela of the opportunity to explain his version of the incident. *Id.*

Here, there was no proffer as to what specific information the defendant possessed regarding Ms. Sweet's alleged "participation" in the prior homicide. In addition, law enforcement's "hunches" as to Ms. Sweet's alleged involvement in the actual homicide involving Bud Brown is of no consequence if that information was not passed on to the defendant by law enforcement prior to the murder of Ms. Sweet, which it was not. This claim has no merit.

2. <u>The defendant invited error, if any, concerning the trial court's analysis regarding the admissibility of any past act of Ms. Sweet under ER 404(b), which could be relevant to defendant's self-defense claim. Moreover, if error, it was not manifest.</u>

The defendant next alleges the trial court erred when it analyzed his claim under ER 404(b). *See* Appellant's Br. at 27-34.

Defense counsel asked the lower court to admit Ms. Sweet's "involvement" in the prior murder under ER 404(b). Accordingly, the trial court analyzed defense's argument under ER 404(b). The invited error doctrine prohibits a party from knowingly and voluntarily setting up an error and then complaining of it on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *In re Pers. Restraint of Call*, 144 Wn.2d 315, 326-28, 28 P.3d 709 (2001). An appellate court applies the invited error doctrine as a "strict rule" to situations where the defendant's actions at least in part caused the error. *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

In the present case, defense counsel argued Ms. Sweet's "involvement" in the prior homicide was admissible as a prior bad act under ER 404(b). CP 21-23; RP 246. The defendant cannot now claim the trial court conducted the wrong legal analysis under ER 404(b) when it was *his* argument during the motion that necessitated the lower court's analysis and finding under ER 404(b). Indeed, the State argued in its briefing to the lower court that it would be improper to analyze the argument regarding the victim under ER 404(b). CP 152-54.

Furthermore, the defendant did not object to the trial court's analysis and use of ER 404(b). Rather, he argued for application of the rule in the lower court. A party must raise an evidentiary objection before the trial

court and not for the first time on appeal. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). Stated differently, "[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Where a defendant does not object below, he may only raise an error on appeal if it is manifest constitutional error. RAP 2.5; *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007).

Washington courts have announced different formulations for "manifest error." First, a manifest error is one "truly of constitutional magnitude." *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Second, some decisions emphasize prejudice, not obviousness. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected his or her rights. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). A third important formulation is the facts necessary to adjudicate the claimed error must be in the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Defendant cannot establish manifest error. Without knowledge of Ms. Sweet's history of *any* violent act or any claim that the defendant was

fearful of Ms. Sweet at the time of the murder based upon past acts, the defendant cannot establish Ms. Sweet's prior violent acts, *if any*, caused him to be fearful of her at the time of the murder. Accordingly, any alleged prior violent act was irrelevant and the defendant cannot show actual prejudice.

Notwithstanding, the defendant was allowed to present evidence supporting his self-defense theory. The trial court instructed on self-defense. Evidence that the victim had disposed of a murder weapon after the fact in 2012 would not have made defendant's story any more believable. The jury heard the defendant's version of events and his argument that he acted in self-defense. There was no error.

3. The defense specifically rejected offering any reputation evidence under ER 404(a)(2) to support an argument that the victim was a "first aggressor."

The defendant also argues the trial court improperly excluded the proposed evidence to show the victim's reputation for a violent disposition at the time of the murder to establish his reasonable apprehension of danger. *See* Appellant's Br. at 24-35. To the contrary, defense counsel rejected offering reputation evidence of the victim at the time of trial. RP 246.

"[E]vidence of a pertinent trait of character of the victim of the crime offered by an accused" is admissible. ER 404(a)(2).[9] Thus, where a defendant asserts self-defense, evidence of the victim's violent disposition is a pertinent character trait because it is relevant to the question of whether the victim acted in conformity with his or her character by provoking the incident as the first aggressor. *See State v. Alexander*, 52 Wn. App. 897, 900, 765 P.2d 321 (1988) ("As evidence that [the victim] was the first aggressor, [the defendant] offered the testimony of two witnesses concerning specific acts of violence by [the victim]. This evidence is relevant to the first aggressor issue in that it tends to show [the victim] had a violent disposition.").

Evidence offered for this purpose "must be in the form of reputation evidence, not evidence of specific acts." *State v. Hutchinson*, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998). "Specific acts may be used to

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[9] ER 404(a)(2) states:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor…

prove character only where the pertinent character trait is an essential element of a claim or defense," and "[s]pecific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense." *Id.* at 886-87.

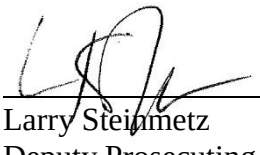
Here, defense counsel suggested during argument that Ms. Sweet was the first aggressor. However, such evidence of a victim's alleged propensity for violence to establish first aggressor "must be in the form of reputation evidence, not evidence of specific acts." *Hutchinson*, 135 Wn.2d at 886. Defense counsel specifically rejected offering reputation character evidence concerning the victim. RP 212-13. Moreover, defendant did not offer a first aggressor instruction and none was given. CP 74-76. There was no error.

IV. CONCLUSION

The State requests this Court deny the defendant's requested relief and affirm the judgment and sentence.

Respectfully submitted this 10 day of January, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. COREY BURNAM, Appellant.	NO. 34946-2-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 10, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Elizabeth Rampersad
rampersadr@nwattorney.net; sloanej@nwattorney.net

1/10/2018 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

January 10, 2018 - 11:13 AM

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